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In The
Supreme Court of the United States
October Term, 1975

No. 75-238

Leroy Callahan,
Petitioner,

v.

Superintendent of Education of Leake County, Mississippi, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1975

No.

LEROY CALLAHAN,

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v.

SUPERINTENDENT OF EDUCATION OF LEAKE COUNTY, MISSISSIPPI, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Leroy Callahan respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 16, 1975, affirming a judgment of the United States District Court for the Southern District of Mississippi.[1]

OPINIONS BELOW

The initial opinion of the Court of Appeals, rendered December 13, 1974, and attached as Appendix A *infra*,

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[1] Respondents are the Superintendent of Education of Leake County, H. M. Price; the Leake County Board of Education; and board members J. Palmer Brantley, J. M. Blocker, John Calvin, Smith, Mrs. Loutrelle Stribling and R. T. Trippe.

is reported at 505 F.2d 83. The opinion of the Court of Appeals on petition for rehearing (May 16, 1975, App. B) is reported at 513 F.2d 51. The district court's findings are embodied in its unreported judgment dated August 22, 1973 (App. D).

JURISDICTION

A timely petition for rehearing and suggestion for rehearing en banc was denied on May 16, 1974.[2] The judgment of the Court of Appeals was entered on May 16, 1975, and its mandate issued on May 27, 1975 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether the First and Fourteenth Amendments and 42 U.S.C. § 1983 prohibit a school board from discharging a principal for the sole reason that there was community opposition to the principal, when that opposition was based in part on racial hostility and opposition to the principal's implementation of court-ordered desegregation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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[2] Petitioner's time for filing a petition for rehearing and suggestion for rehearing en banc was extended until January 17, 1975.

U.S. Constitution, Amendment XIV:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner is a white educator who was employed by the Leake County School District of Mississippi as a principal for the academic years 1970-71 through 1972-73.[3] During this period the Leake County School District was in the throes of desegregation, as mandated by this Court[4] and ordered by the Fifth Circuit.[5] The Superintendent of Leake County Schools determined to terminate petitioner's employment effective at the conclusion of the 1972-73 academic year for the sole reason that there was community opposition to petitioner (App. A

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[3] Petitioner was employed for seven years as an assistant principal in the Leake County Schools before becoming a principal.

[4] *Brown* v. *Board of Education*, 349 U.S. 294 (1955); *Alexander* v. *Board of Education*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana School Board*, 396 U.S. 290 (1970).

[5] *United States* v. *Hinds County School Board*, 417 F.2d 852 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970) (the Leake County School Board was an appellee in this action).

infra, at 8a).[6] The record shows, as the Fifth Circuit confirmed, that some of this community opposition to petitioner "was racially motivated" (App. A *infra*, at 8a) and that the community's opposition "was exacerbated by his [petitioner's] activities in relation to the black students" in his school (App. B *infra*, at 13a).

The chronology of events leading to petitioner's discharge was described by the Fifth Circuit as follows. In January 1970, the Edinburg Attendance Center admitted its first black students pursuant to court order (App. A *infra*, at 3a). At this time white students attempted to "'run off'" the black teachers who were also transferred to the Attendance Center (*id.* at 3a). Petitioner became principal of the Attendance Center beginning with the 1970-71 academic year and supported these black teachers (*id*; H. 145).[7]

In 1971-72, petitioner failed to recommend for reemployment in 1972-73 a popular white football coach, thus causing some community opposition to petitioner (App. A *infra*, at 4a).[8] Notwithstanding this opposition, petitioner's employment for 1972-73 was continued (*id.*).

During the fall months of the 1972-73 school year the following events occurred, as described by the Court:[9]

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[6] The superintendent testified that petitioner is "very capable and qualified to run a school" and that petitioner's employment would have been continued in the absence of community opposition (School Board Transcript, pp. 17, 25).

[7] Citations of this form refer to the transcript of the school board hearing in this case. The transcript of the district court hearing is cited as "Tr. ——."

[8] Petitioner did not recommend the coach for reemployment on grounds that the coach was pilfering funds and merchandise from the school store (Tr. 144-46).

[9] In addition to the facts mentioned in the Fifth Circuit's opinions, the record shows that on approximately November 30, 1972, the Chairman of the Leake County School Board instructed petitioner

"(1) [Petitioner began] placing blacks on cheerleader squad in representative numbers;

"(2) [Petitioner began] allowing blacks to participate fully in homecoming and fund raising activities [which included having a black king and queen of homecoming, as well as a white king and queen [10]];

"(3) [Petitioner began] placing blacks on local board of trustees;

"(4) [Petitioner] referred to in derogatory terms; [11]

"(5) Signs [bearing the legend KKK] painted along the route [petitioner] traveled to his farm;

"(6) Occasional threats passed along to [petitioner], his friends and supporters." [12] (App. B *infra*, at 11a-12a).

On January 16, 1973, petitions, purportedly signed by 148 persons, were presented to the Leake County Board of Education, urging that petitioner be removed from office (H. 12).[13] Two days later, on January 18, 1973, the superintendent advised petitioner that he would not be rehired for the 1973-74 academic year because the "tensions are so high among patrons, teachers and students" (App. A *infra*, at 5a).

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to strip a black coach of his duties (Tr. 52-55, 119-20, 190-92). Petitioner declined, stating that he would only do this on written instruction from the board (Tr. 120, 55).

[10] H. 146-48; Tr. 169-71.

[11] For example, petitioner and his supporters were referred to as "nigger-loving son-of-a-bitches" (H. 188, 193).

[12] For example, the dog of one of Callahan's black coaches was shot and a note was left inside the coach's door saying, "You are next, K.K.K." (Tr. 122.)

[13] Additional petitions were presented in March 1973 (H. 12).

Petitioner initiated an action in the United States District Court for the Southern District of Mississippi under 42 U.S.C. § 1983 (1970) and 28 U.S.C. §§ 1331 and 1343(3) (1970), alleging that the community opposition to him was racially inspired. Specifically, petitioner alleged that the community opposition was based upon the steps he took to comply with the letter and spirit of the Fifth Circuit's decree requiring desegregation. The school board moved for leave to afford a timely hearing to the petitioner upon the allegations set out in his complaint, and the district court ordered the school district to afford petitioner such a hearing.

Following a hearing, the board issued, on July 2, 1973, an opinion approving the superintendent's decision to terminate petitioner at the conclusion of the academic year 1972-73. It found:

> "There was and is substantial opposition among the parents of children attending the Edinburg Attendance Center to the reemployment of Mr. Leroy Callahan * * *. [T]here is very little, if any, racial hostility in the Edinburg School community directed toward Mr. Leroy Callahan; and * * * this was not a factor in the decision [of the superintendent] not to recommend Mr. Leroy Callahan as attendance center principal.
>
> "[T]he administration of Edinburg Attendance Center by Mr. Leroy Callahan on a fully unitary non-discriminatory basis was not the reason for substantial opposition to Mr. Callahan * * *." (App. G *infra* at 26a-27a.)

Two members of the five-member board dissented from the board's decision.

Petitioner returned to the district court on motion for preliminary injunction, consolidated for hearing with trial on the merits. That court received in evidence the record made before the board and heard further testi-

mony. On August 22, 1973, the district court, *per* Judge Nixon, entered a four-page judgment against petitioner (App. D *infra*), stating that the court

> "finds and is of the opinion that the decision not to re-employ the plaintiff as principal of the Edinburg Attendance Center for the scholastic year 1973-74 was not based on any constitutionally impermissible ground but solely upon the determination by the Superintendent of Education of Leake County, Mississippi, Mr. H. M. Price, that there was in fact substantial opposition among the parents of students attending Edinburg Attendance Center to the re-employment of the plaintiff as a school principal and that because of this substantial opposition, his re-employment as school principal would not be in the best interest of public schools at Edinburg Attendance Center." (App. D *infra*, at 17a-18a.)[14]

The district court made no finding that the community opposition to Callahan was free of racial hostility or that the superintendent only relied upon that portion of the community opposition that may have been free of racial motive.

Petitioner appealed. In its first opinion, dated December 13, 1974, the Court of Appeals (*per* Coleman, Clark and Roney, JJ.), stated, "We agree with plaintiff that there was some opposition to him which was racially motivated" (App. A *infra*, at 8a). The court concluded, however, that "[t]he record contains substantial evidence to support the findings that, despite such racially motivated opposition, Superintendent Price's decision not to reemploy Callahan was based on considerations and oppositions unrelated to any efforts of the principal to com-

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[14] By order issued September 27, 1973 (App. E *infra*), the court ordered that its August 22nd judgment be deemed to contain its findings of fact and conclusions of law. Final judgment was entered on October 30, 1973 (App. F *infra*).

ply with court-ordered desegregation" (App. A *infra*, at 8a-9a).

Callahan petitioned for reconsideration on the grounds, *inter alia*, that the court had made material mistakes of chronological fact and sequence. The Fifth Circuit panel, on May 16, 1975, entered a supplemental opinion correcting its mistakes of chronological fact (App. B *infra*).[15] Under its second and "correct view of the facts, the unpopularity because of the run-in with the football coach and other teachers was exacerbated by his activities in relation to the black students." Then, as the court put it: "One hand washes the other. The smooth working operation of a school is of utmost importance to the education of its students, particularly in a school attempting to implement court-ordered desegregation. As we concluded in the original opinion filed in this case, the findings and conclusions of the district court are supported by substantial evidence and are not clearly erroneous."[16] (*Id.* at 13a).

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[15] In its first opinion the Court of Appeals erroneously concluded that petitioner's steps to desegregate his school and the racially inspired opposition to those steps occurred in 1970-71, that petitioner's contract was renewed for 1971-72 notwithstanding the public opposition, and that a new wave of opposition was created in 1971-72 when petitioner determined not to recommend a white football coach for employment (App. A *infra*, at 3a-4a, 8a-9a). In short, the Court of Appeals initially treated the incident with the football coach as a racially neutral intervening cause. Petitioner sought reconsideration because, *inter alia*, while the allegedly neutral events occurred in 1971-72, the events which the panel found gave rise to racially inspired community opposition occurred thereafter in the fall of 1972, shortly before the superintendent decided not to continue petitioner's employment.

[16] The Court of Appeals also said that "we cannot hold to be clearly erroneous the finding of the trial court that, despite the fact that some of the opposition to Callahan was racially motivated, Superintendent Price's decision not to reemploy Callahan was based on considerations and opposition unrelated to any efforts of the principal to comply with court-ordered desegregation." (App. B *infra*, at 12a). In fact, however, the district court made no finding

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Of This Court And Other Federal Courts.

In the case at bar the superintendent and the board of education terminated petitioner solely because of community opposition to him, and the record and opinions of the Court of Appeals confirm that this community opposition was in part racially motivated. As the Court of Appeals concluded, the community opposition that arose in 1971-72 because of Callahan's effort to terminate a popular football coach "was exacerbated by his activities in relation to black students" in 1972-73, the year in which he was terminated. Thus, the body of sentiment relied upon and indeed implemented by the superintendent and the board of education was infected with racially discriminatory motives and opposition to court-ordered desegregation of the schools.

The decisions of this Court "make clear that the impetus for * * * forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972). In addition, the decisions of this Court and other federal courts establish that school officials, in making educational and administrative decisions, cannot bow to community pressure which is racially motivated or antagonistic to court-ordered desegregation.

In *Brown* v. *Board of Education*, 349 U.S. 294 (1955) *(Brown II)*, this Court declared that the principles forged in *Brown I* "cannot be allowed to yield simply because of disagreement with them" (*id.* at 300). In

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respecting the extent to which the community opposition to Callahan was racially inspired or whether the superintendent had been able to separate the racially motivated opposition from that which may have had no racial overtones (App. D *infra*).

Cooper v. *Aaron*, 358 U.S. 1 (1958), this Court accepted the findings that the school board and superintendent of schools in Little Rock, Arkansas, had displayed "entire good faith" and that "the educational progress of all the students, white and colored," had suffered as a result of the community opposition to desegregation which was generated in substantial part by the executive and legislative branches of the State of Arkansas (*id.* at 15); nonetheless, the Court ordered the school district to carry forward with desegregation of its schools. In a concurring opinion, Mr. Justice Frankfurter stated that "the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding [and this] is especially true when they are confronted with a problem like a racially discriminating public school system" (*id.* at 26).

In *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736 n.29 (1964), this Court reiterated the principle that "[n]o plebiscite can legalize an unjust discrimination," quoting *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649, 659 (E.D. La. 1961), *aff'd*, 368 U.S. 515.

In *United States* v. *School District 151 of Cook County, Illinois*, 404 F.2d 1125 (1968), the Seventh Circuit, on appeal from an order granting plaintiffs preliminary injunctive relief, affirmed findings that a school board's rejection of one proposed desegregation plan was racially discriminatory. "[T]hat rejection, in the district court's finding, was not innocent or based on cost, safety, convenience, or other rational basis, but merely because Negro pupils were Negro—a reflection of the resident hostility" (*id.* at 1133). The court noted that "[t]here is no doubt that Board members were under severe pressure from District residents and that performance of duty was made difficult. But this cannot excuse the unconstitutional conduct justifiably found on this record" (*id.*). After trial on the merits, the district court again found

that "[a] substantial factor in the Board's failure to adopt [the proposed plan in question] was the members' reflection of the community sentiment hostile to the desegregation which would result from that Plan," 301 F. Supp. 201, 217 (N.D. Ill. 1969). The court concluded (*id.* at 230) that a school board may not "permit educational choices to be influenced by a policy of racial segregation in order to accommodate community sentiment or the wishes of a majority of voters," citing *Cooper* v. *Aaron*, *supra*, and *Lucas* v. *Colorado General Assembly*, *supra*. The Court of Appeals affirmed again, with one modification not relevant here. 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943.

In *Dowell* v. *Board of Education of Oklahoma City Pub. Schools*, 338 F. Supp. 1256 (W.D. Okla. 1972), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041, the trial court observed that the school board "rationalizes its intransigence [to a desegregation plan] on the constitutionally unsound basis that public opinion is opposed to any further desegregation" (338 F. Supp. at 1270), and ruled, *inter alia*, that "[t]he fact that public opinion may oppose desegregation of the public schools is not a valid reason for failure to comply with the Constitution" (*id.* at 1272).

A similar principle has been applied in the public housing area. In *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907, 914 (N.D. Ill. 1969), the district court concluded that "even if [the Chicago] Aldermen's informal surveys were correct in their uniform assessment of public opinion, they cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing," citing *United States* v. *School District 151 of Cook County, Illinois*, *supra*, 404 F.2d 1125 (7th

Cir. 1968), and *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).[17]

The decision below permits school districts to fire teachers and administrators who are "very capable to run a school" (see note 6, *supra*) solely because of community opposition to them which is based in part on racially discriminatory motives and opposition to court-ordered desegregation. That decision conflicts with the decisions of this Court and other federal courts and should therefore be reviewed.

II. The Decision Below Presents An Important Ruling That Jeopardizes The Employment Of Administrators And Teachers In The Fifth Circuit Who Have Endeavored To Comply With Court Orders Requiring The Establishment And Maintenance Of Unitary Schools.

There are approximately 1,728 school districts in the Fifth Circuit.[18] Many, if not most, of these school districts are now subject to court orders or compliance agreements with the U.S. Department of Health, Education and Welfare, governing the steps that must be taken to establish and maintain a unitary system of public schools.[19] The teachers and administrators in these systems who are endeavoring to comply with court orders and compliance agreements, notwithstanding public opposition, are entitled to protection. If the decision below

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[17] This order was not appealed. A later aspect of the much-litigated *Gautreaux* case—dealing with remedy—is now before this Court in No. 74-1047, *Hills* v. *Gautreaux*, *cert. granted sub nom. Mitchell* v. *Gautreaux*, May 12, 1974, 43 U.S.L.W. 3597.

[18] National Education Association, "Estimates of School Statistics, 1974-75," p. 22.

[19] We are advised by the Education Section of the United States Department of Justice, Civil Rights Division, that the Education Section is participating as plaintiff, plaintiff-intervenor or amicus curiae in cases involving approximately 427 school districts located in the Fifth Circuit.

is allowed to stand, no school official can safely buck community opposition to school desegregation.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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